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No. 264

In the Supreme Court of the United States

OCTOBER TERM, 1969

GORDON S. MILLER AND FRANCES G. MILLER, PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

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1. Section 203 of the Bank Conservation Act, 48 Stat. 2, 12 U.S.C. 203, provides that "[w]henever he shall deem it necessary in order to conserve the assets of any [national] bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank * * *." Pursuant to this provision, the Acting Comptroller of the Currency (hereafter "Comptroller"), on January 25, 1967, appointed a Conservator for the Wellsville National Bank, Wellsville, Pennsylvania (hereafter "Wellsville") (Pet. App.

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10).[1] The appointment was based upon regular and special examinations of Wellsville's affairs, which revealed, *inter alia:* (1) "apparent and continuing insolvency of the Bank"; (2) "improper banking practices which had led to insolvency"; and (3) "improper and possible unlawful activities" of the Bank's President, petitioner Gordon S. Miller (Pet. App. 11–12).[2] Moreover, the Comptroller acted only after Wellsville's management failed to fulfill repeated promises of reform and rehabilitation (Pet. App. 23–27; App. 2b–17b).

Section 203 also provides that a Conservator "shall have all the rights, powers and privileges now possessed by or hereafter given receivers of insolvent national banks * * *"; and 12 U.S.C. 192 further provides that a receiver of an insolvent national bank, "upon the order of a court of record of competent jurisdiction, * * * may sell all the real and personal property of such association, on such terms as the court shall direct." Acting pursuant to these provisions, and under the Comptroller's instructions, the Conservator entered into an agreement with the Bank of Hanover and Trust Company, Hanover, Pennsyl-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "App.-a" refers to Appellants' Appendix, and "App.-b" refers to the appendix to the Comptroller's Brief in the court of appeals. Copies of these appendices have been lodged with the Clerk of this Court.

[2] *E.g.*, the Comptroller found "a continuous pattern of excessive loans, many of which were collateraled by worthless or dubious assets, improper real estate transactions, inordinate concentration of out of territory loans, lack of adequate credit data and internal controls, low liquidity, unstable and unreliable management * * *" (App. 20a–21a).

vania (hereafter "Hanover"), for the sale to Hanover of Wellsville's assets, and the assumption by Hanover of Wellsville's liabilities (exclusive of liability to shareholders) (Pet. App. 10). Under the agreement, Hanover, which already owned 50.8 percent of Wellsville's stock, agreed to: (1) use "due diligence" to collect Wellsville's doubtful loans, and (2) put the excess of Wellsville's total assets over Wellsville's liabilities into a separate account for the benefit of all of Wellsville's shareholders (Pet. App. 11, n. 3, and 31). The Conservator also petitioned the United States District Court for the Middle District of Pennsylvania to approve the sale pursuant to 12 U.S.C. 192 (Pet. App. 20).

On January 28, 1967, the district court entered an order approving the sale agreement, which it found to be "fair, just, and equitable," and "in the best interests of the Conservatorship estate" (Pet. App. 11). The court's order provided for its service upon all of the Wellsville shareholders, who were permitted to show cause why the order should be set aside (*ibid.*). The only persons to object to the sale were petitioners Gordon S. Miller and his wife, Frances G. Miller, who together owned 10 percent of the Wellsville stock (Pet. App. 11, n. 3). All of Wellsville's directors, except Mr. Miller, had previously indicated that they favored the sale (Pet. App. 21, 27).

The district court thereafter denied petitioners' motion to intervene; but in carrying out its "supervisory" administrative powers under 12 U.S.C. 192, the court "received and evaluated" all of petitioners'

contentions (Pet. App. 22, 28–31). The court then found that petitioners had failed to show that "the envisioned sale of assets would be fraudulent, arbitrary or capricious," and concluded that its previous order was correct (Pet. App. 31).

The court of appeals, in unanimously dismissing petitioners' appeal, rejected all of the contentions advanced by the petition for a writ of certiorari, including petitioners' contention that the district court abused its discretion in accepting as true the Comptroller's averments concerning Wellsville's insolvency (Pet. 9–16; 407 F.2d 223). The court of appeals noted that petitioners had failed to contradict the Comptroller's averments even though petitioners had "had a period of six months in which to take some action that might have caused the district court to grant them a hearing on that issue" (Pet. App. 16).

2. The court of appeals correctly ruled that the Comptroller's appointment of a Conservator and the sale of Wellsville's assets to Hanover were justified, under the clear language of 12 U.S.C. 203 and 12 U.S.C. 192, by Wellsville's insolvency and the improper practices of the Wellsville management. Petitioners contend that they were denied the opportunity to adduce contradictory proof with respect to those issues (Pet. 3–4, 7). However, as the court of appeals stated, petitioners failed in the district court to come forward with such contradictory proof even though

they "had a period of six months" in which to do so (Pet. App. 16).[2]

The court of appeals also noted that its earlier decision in *Minichello* v. *Saxon*, 337 F.2d 75, did not involve a sale of assets in a conservatorship, but concerned instead the ordinary sale of bank assets pursuant to 12 U.S.C. 181 (Pet. App. 14–15). Thus, there is no merit in petitioners' additional contention (Pet. 5) that the court below "ignored its own controlling decision" in *Minichello*.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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[2] Petitioners' offer of contradictory proof was made, for the first time, in the reply brief which petitioners sought to file in the court of appeals. That court properly rejected petitioners' belated attempt to raise matters not presented to the district court or in their opening appellate brief.

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